



**Minutes of the Government Records Council
September 30, 2009 Public Meeting – Open Session**

The meeting was called to order at 9:42 a.m. at the Department of Community Affairs, Conference Room 126, Trenton, New Jersey. The Open Public Meetings Act statement was read.

The pledge of allegiance was recited while standing by all.

The meeting notice and fire emergency procedure was read by Ms. Tabakin.

Ms. Hairston called the roll:

Present: Robin Berg Tabakin, Chairwoman, Janice Kovach (designee of Department of Community Affairs Acting Commissioner Charles Richman), Kathryn Forsyth (designee of Department of Education Commissioner Lucille Davy) and Stacy Spera (designee of Department of Community Affairs Acting Commissioner Charles Richman only for the matters of (1) Donald Baldwin v. Township of Readington (Hunterdon), (2006-165) and (2) Tracy Carluccio v. NJ Department of Environmental Protection (2008-10)).

GRC Staff In Attendance: Executive Director Catherine Starghill, In-House Counsel Karyn Gordon, GRC Secretary Brigitte Hairston, Case Managers: Dara Lownie, Frank Caruso, John Stewart, Sherin Keys, Resource Manager Jyothi Pamidimukkala, Designated Outside Counsel Gina Orosz, and Deputy Attorney General Debra Allen.

A motion was made by Ms. Kovach and seconded by Ms. Forsyth to approve the amended open session minutes of the June 23, 2009 meeting. The motion passes by an unanimous vote.

A motion was made by Ms. Forsyth and seconded by Ms. Kovach to approve the open session minutes of the August 11, 2009 meeting. The motion passes by an unanimous vote.

A motion was made by Ms. Forsyth and seconded by Ms. Kovach to approve the closed session minutes of the August 11, 2009 meeting. The motion passes by an unanimous vote.

Council Adjudication:

The following complaints were presented to the Council for summary administrative adjudication:

1. John Paff v. Township of Washington (Warren) (2007-241)
2. Leigh Fava v. City of South Amboy (Middlesex) (2008-187)
3. Tom Foregger v. County of Union (2008-237)
4. Shawn Reason v. Union County Prosecutor's Office (2008-252)
5. David H Weiner v. County of Essex (2009-05)
6. Jesse Wolosky v. Township of Hopatcong (Sussex) (2009-13)
7. Kaitlin A. McKenzie-Fiumara v. NJ Department of Treasury (2009-31)
8. Charlie Uhrmann v. Township of Mount Olive (Morris) (2009-106)
9. Frank D'Amore v. Borough of North Plainfield (Somerset) (2009-136)
10. Robert Frederick v. Borough of Clementon (Camden) (2009-170)
11. Marilyn Gasior v. Sparta Township Board of Education (Sussex) (2009-173)
12. Rashaun Barkley v. NJ Department of Treasury (2009-189)
13. Rashaun Barkley v. NJ Department of Law & Public Safety, Division of State Police (2009-190)
14. Karen DeMarco v. Borough of Emerson (Bergen) (2009-198)
15. Rashaun Barkley v. Township of Maplewood (Essex) (2009-208)
16. Frank D'Amore v. Borough of North Plainfield (Somerset) (2009-216)
17. Rashaun Barkley v. Essex County Prosecutor's Office (2009-241)
18. Dean Feasel v. East Brunswick Board of Education (Middlesex) (2009-244)

Ms. Tabakin called for a motion to accept the Executive Director's recommendations as written in all of the above Administrative Complaint Dispositions. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

The following complaints were presented to the Council for individual adjudication:

James D'Andrea v. NJ Department of Community Affairs, Division of Local Government Services (2007-64)

This matter was not put to a vote due to the lack of a quorum.

William Gettler v. Wantage Regional Schools, Board of Education (2007-105) (Sussex)

This matter was not put to a vote due to the lack of a quorum.

Joyce Blay v. Jackson Board of Education (Ocean) (2007-177)

This matter was not put to a vote due to the lack of a quorum.

John Paff v. Borough of Lavallette (Ocean) (2007-209) RBT Recusal

This matter was not put to a vote due to the lack of a quorum.

David Hinchcliffe v. NJ Department of Community Affairs, Division of Local Government Services (2007-306)

This matter was not put to a vote due to the lack of a quorum.

John Bentz v. Borough of Paramus (Bergen) (2008-89)

This matter was not put to a vote due to the lack of a quorum.

Ursula Cargill v. NJ Department of Education (2009-09)

This matter was not put to a vote due to the lack of a quorum.

Ursula Cargill v. State Ethics Commission (2009-10)

This matter was not put to a vote due to the lack of a quorum.

Donald Baldwin v. Township of Readington (Hunterdon) (2006-165)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because the Complainant has failed to establish in his request for reconsideration of the Council's October 29, 2008 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious or unreasonable decision, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Because the Custodian certified that she reviewed all of the records vis-à-vis the *In Camera* Table in the Council's October 29, 2008 Interim Order, made all necessary redactions and provided copies of the disclosable records to the Complainant on November 12, 2008, which is within the time period set forth in the Interim Order as extended, and because the Custodian subsequently provided a timely certification to the GRC, the Custodian has complied with the Council's October 29, 2008 Interim Order.
3. Although the Custodian failed to respond in writing to the Complainant's entire OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian did comply in a timely manner to the Council's April 25, 2007 Interim Order directing the Custodian to provide records to the GRC for *in camera* inspection. The Custodian also complied with the Council's October 29, 2008 Interim Order in a timely manner disclosing a large quantity of redacted and unredacted records to the Complainant. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee

pursuant to N.J.S.A. 47:1A-6 and Teeters. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Spera. The motion passed unanimously.

Tracy Carluccio v. NJ Department of Environmental Protection (2008-10)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Complainant's OPRA request is invalid under OPRA and the Custodian had no legal duty to research the New Jersey Department of Environmental Protection's records to locate records potentially responsive to the Complainant's request **under OPRA** pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). See Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). See also: Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
2. Many agencies grant administrative records requests outside the bounds of OPRA for such documents as building inspection reports, motor vehicle accident reports, birth certificates and municipal resolutions. Based on the foregoing, although the New Jersey Department of Environmental Protection made a considerable effort to comply with the Complainant's invalid OPRA request, the New Jersey Department of Environmental Protection may have considered suggesting to the Complainant (and all requestors of similarly broad and unclear requests which have been judicially determined invalid under OPRA) an alternate process to obtain the records sought, separate from the legal requirements and constraints of OPRA.
3. The New Jersey Department of Environmental Protection's policy of a flat \$48.00 Extraordinary Time charge is not legally appropriate pursuant to N.J.S.A. 47:1A-5.c. because each special service charge must be the reasonable actual direct cost of providing records determined on a case by case basis, as held in The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002) and Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). Thus, the special service charge assessed by the Custodian and paid by the Complainant is not supported by OPRA. However, the GRC takes notice that the "actual direct cost" is likely much higher than the amount charged by the Custodian. The GRC will not order the Custodian to charge more since the request is not a valid OPRA request.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Spera. The motion passed unanimously.

Howard Kupferman v. Long Hill Township Board of Education (Morris) (2007-152)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because *N.J.A.C. 6A:23-8.7(a)* provides that a board of education budget must be made available to the public upon its submission to the county superintendent or by the statutory submission date, whichever is earlier, and because the 2007-2008 budget's submission to the county superintendent predated the Complainant's OPRA request for said budget, and because *N.J.S.A. 47:1A-5.e.* provides that "[i]mmediate access ordinarily shall be granted to budgets...", by not making the records immediately available upon receipt of the Complainant's OPRA request, the Custodian unlawfully denied the Complainant access to the budget and the budget spreadsheets, listed as Items #1 and #3 of the Complainant's March 14, 2007 records request, respectively.
2. Because the Custodian failed to prove that the denial of access was authorized by law, the Custodian shall disclose in the medium requested the records listed as Item #3 of the Complainant's March 14, 2007 records request with appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).¹
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4², to the Executive Director.**
4. Because the Custodian responded to the Complainant's March 14, 2007 OPRA request on the same day the request was received by denying the Complainant access to the 2005-2006 audited financial statements via e-mail in spreadsheet format, in a medium conducive to e-mail delivery which was the medium requested, and because *N.J.S.A. 47:1A-5.d.* provides that a custodian shall permit access to a government record in the medium requested, the Custodian has unlawfully denied access to Item 2(a) of the Complainant's March 14, 2007 request.

¹ The record listed as Item #1, the 2007-2008 line item budget, was previously disclosed to the Complainant electronically on April 13, 2007.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

5. Because the Custodian certified that he informed the Complainant that there were no records responsive to the Complainant's request for the 2006-2007 audited financial statements, and because there is no credible evidence to refute the Custodian's certification in the record, the Custodian did not unlawfully deny the Complainant access to the audited financial statements for 2006-2007, listed as Item #2(b) of the Complainant's March 14, 2007 records request, pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Because the records requested in Item #1 and Item #2 of the Complainant's March 31, 2007 request were used as part of the decision-making process to produce the 2003-2004, 2004-2005 and 2005-2006 budgets and audited financial statements, the records are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute advisory, consultative, or deliberative material, therefore the Custodian has no legal duty to disclose said records.
7. The Complainant's records requests dated April 25, 2007 and May 8, 2007 were not valid OPRA requests because the Complainant refused to submit the requests on the official OPRA request forms provided by the Long Hill Township Board of Education, and as such, the Custodian's refusal to fulfill the records requests does not amount to an unlawful denial of access pursuant to the provisions of OPRA.
8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Beth Barile v. Stillwater Township (Sussex) (2007-92)

Ms. Starghill reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian in this complaint delivered to the Council on August 21, 2009 (within five (5) business days from her receipt of the Council's Interim Order) a legal certification, in accordance with N.J. Court Rule 1:4-4, indicating that the executive session minutes have been disclosed to the Complainant as ordered. Therefore, the Custodian has complied with the Council's August 11, 2009 Interim Order.
2. Although the Custodian's response to the Complainant that OPRA does not apply to home computers was improper and not supported by any provisions of OPRA or ensuing case law, and although the Stillwater Township ordinance establishing OPRA

request copying fees in excess of the actual cost and enumerated fees authorized by OPRA is invalid, and despite the Custodian's noncompliance with the Council's February 25, 2009 Interim Order, the Custodian did comply with the Council's August 11, 2009 Interim Order by providing the requested executive session minutes with appropriate redactions to the Complainant pursuant to the *in camera* review findings and recommendations. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Richard Redden v. Cape May County Prosecutor's Office (2007-206)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because item no. 1 of the Complainant's OPRA request sought access to an entire Prosecutor's Office file, which comprised three (3) banker boxes and 2,594 pages, and because said request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records pursuant to Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009), and Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (July 2008), said request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Besides not providing a timely response to the Complainant's OPRA request, the Custodian has not unlawfully denied access to item nos. 2-14 of the Complainant's OPRA request.

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Randolph Young v. NJ Department of Personnel (2007-210)

Mr. Stewart reviewed the GRC’s analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that the table in the Council’s August 11, 2009 Interim Order be modified as follows:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the In Camera Examination
1	New Jersey Department of Personnel, Division of Human Resource Management <i>Position Classification Questionnaire</i> for Employee Dennis C. Reddick dated January 12, 2006 (3 pages).	Record detailing Dennis C. Reddick’s job responsibilities and salary.	1) Redactions of supervisory status and performance evaluation of public employees were based on the personnel exemption contained in <u>N.J.S.A. 47:1A-10</u> 2) Initial denial of access to questionnaire was pursuant to <u>N.J.S.A. 47:1A-1.1</u> . for its advisory, consultative or deliberative role in the classification process.	Page 3, response to Item 15(A): redact the first sentence which contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Page 3, response to Item 15(B): redact in its entirety because it contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . The balance of the record contains factual material that is not ACD. However, as a personnel record

				pursuant to <u>N.J.S.A. 47:1A-10</u> , the entire record is exempt from disclosure except for the individual's name in Block #1, salary in Block #2, position in Block #5, title in Block #6 and payroll record in Block #9.
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On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's clarification of its August 11, 2009 Interim Order set forth in the table above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4, to the Executive Director.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Katherine Watt v. Borough of North Plainfield (Somerset) (2007-246)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the Complainant's May 16, 2007, September 13, 2007 and September 25, 2007 OPRA requests are overly broad because they fail to specify identifiable government records and require the Custodian to conduct research in order to determine the records which may be responsive to the requests, the Complainant's three (3) OPRA requests are invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Mr. Kovach. The motion passed unanimously.

Joan McGee v. Township of East Amwell (Hunterdon) (2007-305)

Ms. Starghill reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Starghill presented the following recommendations to the Council with amendments:

The Executive Director respectfully recommends the Council find:

1. The Custodian in this complaint delivered to the Council on August 19, 2009 (within five (5) business days from receipt of the Council's Interim Order) a legal certification, in accordance with N.J. Court Rule 1:4-4, that the e-mails have been disclosed to the Complainant as ordered. Therefore, the Custodian has complied with the Council's August 11, 2009 Interim Order.
2. The Complainant has failed to establish in the request for reconsideration of the Council's August 11, 2009 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious or unreasonable decision, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she responded verbally to the Complainant's OPRA request and did not provide a written explanation for the denial of access to e-mails requested until the thirteenth (13th) business day following receipt of the OPRA request resulting in a "deemed" denial, the Custodian did comply with the Council's April 29, 2009 and August 11, 2009 Interim Orders by providing the requested e-mails to the Council for an *in camera* review and the redacted e-mails to the Complainant pursuant to the *in camera* review findings and recommendations. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations with amendments. A motion was made by Ms. Kovach and seconded by Mr. Forsyth. The motion passed unanimously.

Larry Kohn v. Township of Livingston (Essex) (2007-323)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Although the Custodian responded in writing to the Complainant's November 21, 2007 and November 22, 2007 OPRA requests within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian certified in the Statement of Information that no records which were responsive to the Complainant's November 21, 2007 request Item No. 1 and November 22, 2007 OPRA request relevant to this complaint existed at the time of the Complainant's two (2) requests, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., he has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records No. 1, No. 2, No. 3, No. 5 and No. 6 responsive to the Complainant's November 21, 2007 request to determine the validity of the Custodian's assertion that the records pertain to pending litigation and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 3 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁵, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Mr. Kovach. The motion passed unanimously.

J.C. v. Bernards Township Board of Education (Somerset) (2008-18)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

³ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in her request for reconsideration of the Council's June 23, 2009 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious or unreasonable decision, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). :

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Mr. Forsyth. The motion passed unanimously.

Stephen Jung v. Borough of Roselle (Union) (2008-52)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Moreover, OPRA provides that "the requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied." N.J.S.A. 47:1A-5.i. Consequently, the Custodian's failure to respond by March 10, 2008, as stated in the Custodian's February 29, 2008 letter to the Complainant, also results in a "deemed" denial.
2. Because the Custodian failed to grant immediate access to the Complainant's request for budget material, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Because Request Item Nos. 3-5, 8 and 9 fail to specify identifiable government records and Request Item Nos. 2-5, 8 and 9 would require the Custodian to conduct research, Request Item Nos. 2-5, 8 and 9 are invalid pursuant to MAG Entertainment LLC. V. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to Request Item Nos. 2-5, 8 and 9.

4. Because the Custodian certified that no records responsive exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested cell phone records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days and further failed to grant or deny access on the date established as the extended response date, and also failed to grant immediate access to the requested budget material, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because the Custodian provided the Complainant with the requested records that were under her direct control approximately thirteen (13) business days following the date of the Complainant's request and made repeated attempts to procure the remaining records despite the invalid nature of the request items. However, the Custodian's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Joseph Evelina v. City of Garfield (Bergen) (2008-57)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian's request for an extension of time to comply with the Complainant's OPRA request is invalid pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to make said request in writing within the statutorily mandated seven (7) business days, and failed to provide an anticipated deadline date on which he would provide the requested records to the Complainant.
2. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the Custodian in this complaint certified that the requested meeting minutes were not prepared at the time of the Complainant's OPRA request, and because the Custodian is not required to create records in response to a request, pursuant to MAG

Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), the Custodian would have borne his burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.

4. Because the Custodian in this complaint certified that there are no records responsive to the Complainant's request for correspondence between Garfield City Council members and the Passaic Valley Water Commission and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

John Bart v. County of Passaic (2008-59)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to items # 2-4 of the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of said request items pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because items # 2-4 of the Complainant's OPRA request fail to identify with reasonable clarity the records sought, and because the Complainant's request requires an open-ended search of the Public Housing Authority's files, as well as because the Custodian is not required to conduct research in response to an OPRA request, said items are invalid. As such, the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), and Bart v. Passaic County Public Housing Agency, 406 N.J.Super. 445 (App. Div. 2009).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Kovach. The motion passed unanimously.

Catherine DeAppolonio v. Borough of Deal (Monmouth) (2008-62)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. While the Custodian's response to the Complainant's request was within the time allowed by N.J.S.A. 47:1A-5.i., his response was not in compliance with OPRA because it failed to provide a specific basis for denying the Complainant access to certain records pursuant to N.J.S.A. 47:1A-5.g. and the Council's decisions in Seabrook v. Cherry Hill Police Department, GRC Complaint No. 2004-40 (April 2004), Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005), Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (October 2005) and Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008).
2. Because the Complainant's requests are not requests for specifically identifiable government records and because the Custodian is not required to conduct research in response to a request, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
3. Although the Custodian violated OPRA by failing to provide a specific basis for the denial of access, the Complainant's OPRA request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005). Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's failure to supply the Complainant with a specific basis for the denial of access appears negligent and heedless since he is vested with the legal responsibility of providing the Complainant with a specific basis for denial.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Mary Burke v. Borough of Brielle (Monmouth) (2008-65)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that he is not the Custodian of Records for the Brielle Volunteer Fire Company No. 1 or the Brielle First Aid Squad, and because the Custodian certified that he forwarded the Complainant's OPRA request to the appropriate Custodians on November 26, 2007 and notified the Complainant in writing of such on December 3, 2007, the Custodian has not unlawfully denied access to the Complainant's OPRA request, and the Custodian has properly forwarded said request to the appropriate Custodians pursuant to N.J.S.A. 47:1A-5.h.
2. Because the Complainant failed to identify with reasonable clarity the records sought, and because the Complainant's request requires an open-ended search of the Fire Company's and the First Aid Squad's files, the Complainant's OPRA request is invalid. As such, the Brielle Volunteer Fire Company No. 1 and the Brielle First Aid Squad have not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Further, because the Complainant's OPRA request is invalid, the Council declines to determine whether the Brielle Volunteer Fire Company No. 1 or the Brielle First Aid Squad are considered public agencies under OPRA.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Bernard Neugebauer & Joseph Muz v. Borough of Leonia (Bergen) (2008-69)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Acting Custodian Jack Terhune's failure to respond in writing to the Complainants' OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because every item listed in the Complainants' request is a request for information and not a request for a specific identifiable government record, and because when a request fails to specifically identify the records sought that request is not encompassed by OPRA, the Custodian has met the burden of proof that access to

these records was not unlawfully denied pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

3. Although Acting Custodian Jack Terhune's failure to provide a written response to the Complainants' OPRA request within the statutorily mandated seven (7) business day period resulted in a "deemed" denial, because the Acting Custodian did respond to the Complainant in writing on the tenth (10th) business day following the date of the Complainant's request, it is concluded that the Acting Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, Acting Custodian Jack Terhune's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Tina Renna v. Union County Improvement Authority (Union) (2008-86)

Ms. Starghill reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. While the Custodian did not initially comply with the Interim Order in a timely matter, Custodian Counsel's actions were prudent and timely thereafter. Therefore, the Custodian has complied with the Council's August 11, 2009 Interim Order.
2. Although the Recording Secretary granted access to the requested attorney invoices within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the redactions resulting in an insufficient response pursuant to N.J.S.A. 47:1A-5.g., and although the Custodian did not appropriately comply with the Council's March 25, 2009 Interim Order and did not initially comply in a timely matter with the Council's August 11, 2009 Interim Order, Custodian Counsel's actions were prudent and timely thereafter. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's August 11, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the

custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual casual nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Ali Morgano v. Essex County Prosecutor's Office (2008-92)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because the Custodian certified that within the statutorily mandated response time she disclosed copies of the records responsive to Item #3 and Item #4 of the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has not denied access to said records.
2. Because Item #2 of the Complainant's request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific identifiable government record, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decisions in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006).
3. Because the Custodian certifies that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive for Item #1, #5, #6 and #7 of the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Dean Feasel v. City of Trenton (Mercer) (2008-103)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his motion for reconsideration of the Council's April 29, 2009 Findings and Recommendations that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Joe Ungaro v. Town of Dover (Morris) (2008-115)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, as well as because the Custodian has failed to cite to any other legal authority that would exempt the settlement agreement from public access based on the confidentiality clause, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis for a denial of access under OPRA. As such, the Custodian has failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the requested settlement agreement to the Complainant.
2. Because the requested settlement agreement is subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif.

denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), the Council declines to address the Custodian's other raised exemptions.

3. **The Custodian shall comply with item # 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Leonard Lucente v. City of Union City (Hudson) (2008-119)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, in which the Custodian requested an extension of time to fulfill said request, the Custodian's written response is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to provide an anticipated deadline date upon which he will provide the requested records to the Complainant.
2. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following requested records to determine the validity of the Custodian's assertion that the records are either privileged communications between an attorney and his/her client, and are not government records pursuant to N.J.S.A. 47:1A-1.1, the records constitute advisory, consultative or deliberative process material (pre-decisional) pursuant to

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

N.J.S.A. 47:1A-1.1, or the records are not controlled by OPRA, but by the Rules of Court pursuant to N.J.S.A. 47:1A-9:

- a. Correspondence from City Attorney to Commissioner re: Lucente grievance dated August 19, 1998 (3 pages)
 - b. Correspondence from ABC Prosecutor Gregory T. Farmer to Commissioner re: Union City ABC matter dated November 19, 1999 (1 page)
 - c. Memorandum from Commissioner's office to City Attorney re: Leonard Lucente dated September 27, 2000 (1 page)
 - d. Memorandum from Commissioner's office to City Attorney re: Leonard Lucente dated October 27, 2000 (1 page)
 - e. Memo from Commissioner Michael Leggiero to Commissioner Lopez re: request for office space dated January 11, 2001 (1 page)
 - f. Correspondence from City Treasurer's office to City Attorney re: Leonard Lucente dated March 11, 2001 (13 pages)
 - g. Correspondence from City Attorney to City Payroll Department re: Leonard Lucente dated March 16, 2001 (2 pages)
 - h. Correspondence from City Attorney to Commissioner re: Leonard Lucente dated March 27, 2001 (1 page)
 - i. Correspondence from City Attorney to Commissioner re: Union City and UCEA dated December 13, 2001 (1 page)
 - j. Memorandum from City Attorney to Commissioner re: another City employee and Leonard Lucente dated January 15, 2002 (1 page)
 - k. Correspondence from City Attorney to Commissioner re: settlement, Leonard Lucente dated November 8, 2002 (11 pages)
 - l. Correspondence from Scarinci and Hollenbeck, City Attorney to Union City Commissioner re: request for public records dated December 17, 2002 (2 pages)
 - m. Memorandum to City of Union City re: income source verification (Family Part Matter) dated March 30, 2006 (1 page)
4. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #3 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁹, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Custodian lawfully redacted or withheld from disclosure the handwritten notes contained on the Complainant's personnel records because said notes are informal memory aids and are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of

⁷ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁸ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Education, 391 N.J. Super. 534, 538 (App. Div. 2007). Thus, the Custodian has carried his burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.

6. The Custodian unlawfully denied access to the portions of the records enumerated below which disclose an individual's name, title, position, salary, payroll record, length of service, date of termination of public employment and the reason for separation, and the amount and type of pension received pursuant to N.J.S.A. 47:1A-10. As such, the Custodian must disclose said portions to the Complainant.
 - a. Memorandum from Mayor Robert Menendez to Payroll Department dated July 30, 1990 (4 pages)
 - b. Memorandum from Joseph R. Marini to Michael Licameli re: accumulated time for 1993 – Department of City Clerk dated February 4, 1994 (1 page)
7. **The Custodian shall comply with item # 6 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁰, to the Executive Director.**
8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

David Matthews v. Englewood Public School, Board of Education (Bergen) (2008-134)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request for payments made by Englewood Public Schools to Schenck, Price, Smith & King, LLC, either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that a responsive record existed at the time of the Complainant's OPRA request, the Custodian has unlawfully denied access to the

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

check dated February 28, 2008. **The Custodian shall disclose the requested check with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-5.g.**

3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹¹, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Philip Rich v. Randolph Township (Morris) (2008-149)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that although the Complainant identified specific types of records in his OPRA request Items No. 1 through No. 6, the request items failed to specify dates and/or individuals; the Custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). As such, the Complainant's OPRA request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Ouddoos Farra'D v. NJ Department of Corrections (2008-194)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

¹¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

The Executive Director respectfully recommends the Council find that pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey, 2002), Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005) and N.J.A.C. 10A:1-1.4 through 31-6.13 of the New Jersey Department of Corrections’ proposed regulations, the Custodian has not unlawfully denied the Complainant access to the record requested because the requested record was exempt from disclosure as a Special Investigation Division record, an informant record and a record relating to an identified individual which, if disclosed, would jeopardize the safety of the named person.

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Joseph Krrywda v. Barnegat Township School District (Ocean) (2008-200)

Mr. Caruso reviewed the GRC’s analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that based on the contested facts in this complaint, the GRC is unable to determine whether or not the original Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for a determination of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Randy George v. NJ Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skyland (2008-206)

Ms. Gordon reviewed the GRC’s analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the Custodian has failed to establish in his motion for reconsideration of the Council’s June 23, 2009 Decision and Findings and Recommendations that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The

Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Randy George v. NJ Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skyland (2008-209)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the Custodian has failed to establish in his motion for reconsideration of the Council's June 23, 2009 Decision and Findings and Recommendations that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Jesse Wolozky v. Township of Sparta (Sussex) (2008-219)

Ms. Starghill reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian's insufficient responses to the Complainant's July 9, 2008 and July 31, 2008 OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The response to the July 9, 2008 OPRA request was insufficient because the Custodian did not provide all requested records and did not provide the lawful basis

for the redactions made to the records pursuant to N.J.S.A. 47:1A-5.g. The response to the July 31, 2008 OPRA request was insufficient because the Custodian did not provide the extended date upon which the records would be provided, did not provide the records until twenty-two (22) business days following receipt of the request, and did not provide the lawful basis for the redactions made to the records. *See* Badini v. County of Hunterdon, GRC Complaint No. 2008-122 (June 2009) (custodian failed to inform the Complainant of a date certain within the statutorily mandated timeframe). *See also* Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-322 (June 2009).

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following 2008 redacted executive session minutes and 2007 and 2008 Friday memos to determine the validity of the Custodian's assertion that the redacted information is exempt:

Executive Session Minutes – January 8, 2008; January 17, 2008; February 7, 2008; March 4, 2008; March 25, 2008; April 8, 2008; April 22, 2008; May 15, 2008; and June 12, 2008.

Friday Memos – January 4, 2007; January 12, 2007; March 2, 2008; March 9, 2007 (Budget Update); March 16, 2007; April 13, 2007; February 1, 2008; March 14, 2008; April 4, 2008; April 11, 2008; April 25, 2008; May 2, 2008; May 9, 2008, May 23, 2008; and June 27, 2008.

3. **The Custodian must deliver¹² to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index¹³, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁴, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Jacqueline Andrews v. Township of Irvington (Essex) (2008-232)

¹² The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹³ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Jacqueline Andrews v. Township of Irvington (Essex) (2008-243)

Jacqueline Andrews v. Township of Irvington (Essex) (2009-39)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the Council is required by N.J.S.A. 47:1A-6.e. to dispose of Denial of Access Complaints in a summary or expedited manner, and because referral of these consolidated matters at this time directly to the Office of Administrative Law for a hearing to develop the record is in the public interest and consistent with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 1:1*, this complaint should be referred to the Office of Administrative Law for hearing. Moreover, any issues regarding necessary filings and the implications thereof may be addressed by the Administrative Law Judge consistent with the provisions of the Administrative Procedures Act and the Uniform Administrative Procedures Rules.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Damon Venable v. Essex County Prosecutor's Office (2008-249)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the Complainant failed to specify identifiable government records, the Complainant's request is invalid under OPRA pursuant to MAG Entertainment LLC. V. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Therefore, the Custodian has not unlawfully denied the Complainant access to the records requested.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Robert Verry v. Borough of South Bound Brook (Somerset) (2008-253)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Although the Custodian properly responded in writing requesting an extension of ten (10) to fourteen (14) days to respond to the Complainant's OPRA request on the same

business day as receipt of such request, the Custodian's failure to respond in writing within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

2. Because the Custodian conducted a reasonable search for the requested executive session meeting minutes, and because the Custodian certified that he was not aware of the existence of the additional executive session meeting minutes which were misfiled within the Custodian's office, the Custodian did not unlawfully deny access to said minutes and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the extended time frame resulted in a "deemed" denial, because the Custodian certified that he provided the executive session meeting minutes responsive for inspection to the Complainant on April 23, 2009 and because the Custodian did not unlawfully deny access to the additional executive session meeting minutes located in his office because he was unaware of their existence, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Henry Knaust v. Township of Frankford (Sussex) (2008-256)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Although the Custodian responded in writing granting access to the Complainant's OPRA request in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008).
2. Although the Custodian's failure to address the Complainant's preferred method of delivery in her response to the OPRA request resulted in a violation of N.J.S.A. 47:1A-5.g., because the Custodian provided access to all records responsive via facsimile on November 6, 2008, as requested by the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and

heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Specifically, the Custodian provided access to all records responsive in one of the Complainant’s preferred methods of delivery prior to the filing of this complaint. Additionally, using the catalyst theory, there is no factual causal nexus between the filing of the Complainant’s Denial of Access Complaint and the Custodian’s technical violation of OPRA and subsequent Statement of Information certification.

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Anonymous v. Franklin Township, Fire District #1 (Somerset) (2008-257)

Ms. Gordon reviewed the GRC’s analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because the evidence of record indicates that the Custodian sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, and because the Custodian provided records responsive within the extended response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following requested records to determine the validity of the Custodian’s assertion that the records contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and personnel matters exempt from disclosure pursuant to N.J.S.A. 47:1A-10:

- Resolution 06-18
- Resolution 08-01
- Resolution 08-03
- Resolution 08-04
- Resolution 08-08
- Resolution 08-20
- Resolution 08-21
- Special Meeting Minutes dated July 5, 2006

- Meeting minutes dated December 10, 2007
 - Executive session meeting minutes dated January 28, 2008
 - Executive session meeting minutes dated May 19, 2008
 - Executive session meeting minutes dated June 23, 2008
3. **The Custodian must deliver¹⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents set forth at paragraph 2 above, a document or redaction index,¹⁶ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁷ that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

The Council also directs the Custodian to provide a certification that the July 5, 2006 meeting minutes are the official and only version of such minutes in existence, as well as any Resolution or motion authorizing the July 5, 2006 executive session meeting, or a certification that such Resolution or motion does not exist.

4. The Council defers analysis of whether the Custodian's response failed to set forth a specific legal basis for the denial of access to the requested records pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Chris Rogers v. Roxbury Board of Education (Morris) (2008-267)

Chris Rogers v. Roxbury Board of Education (Morris) (2008-268)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the memorandum of agreement and the inter-local agreement are pre-decisional draft documents, they are exempt from disclosure as advisory, consultative and deliberative

¹⁵ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

material pursuant to N.J.S.A. 47:1A-1.1; *see also* Kohn v. Township of Livingston, GRC Complaint No. 2007-319 (July 2008); Haemmerle v. Township of Washington, GRC Complaint No. 2006-106 (June 2007); O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). The custodian did not, therefore, unlawfully deny access to the requested records. N.J.S.A. 47:1A-6.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Keys. The motion passed unanimously.

Jesse Wolosky v. Township of Frankford (Sussex) (2008-278)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the transcript of the August 28, 2008 executive session meeting minutes to determine the validity of the Custodian's assertion that the record contains privileged material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹⁸ to the Council in a sealed envelope nine (9) copies of the transcript from the August 28, 2008 executive session meeting minutes, a document or redaction index¹⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4²⁰, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Pursuant to N.J.S.A. 47:1A-5.b., N.J.S.A. 47:1A-5.c., and The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002), a special service fee is not warranted because the Custodian has failed to prove that the duplication process requires an extraordinary expenditure of time or effort and has submitted no proof that the actual cost of duplication is \$25 per audio tape. The Custodian has therefore violated N.J.S.A. 47:1A-5.b. and N.J.S.A. 47:1A-5.c.
4. Although the Custodian has not met her burden of proving that the \$25 per audio tape copying fee is permissible under OPRA, N.J.S.A. 47:1A-5.b. permits the Custodian to charge the actual cost of duplication. Accordingly, the Custodian must charge the Complainant only the actual cost of the audio cassettes and no cost for the approximate 1 hour the Custodian claims is required to make the tapes because like in

¹⁸ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

²⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian is not required to stand watch during the duplication of the recording. The Custodian need only set up the recording device, push a button, walk away and return to switch cassettes until the end of the duplication process. Therefore, the Custodian is required to refund the cost charged to the Complainant to the extent it exceeds the actual cost of the audio cassettes. **The Custodian must provide a legal certification, in accordance with N.J. Court Rule 1:4-4²¹, that the refund has been given to the Complainant and the amount of the refund as directed by the Council. Such certification must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Complaints on Appeal: None.

Complaints Adjudicated on NJ Superior Court & NJ Supreme Court: None.

Executive Director's Report and New Business: The Executive Director reminded the Council members that they were given tentative 2010 dates for GRC meetings and that they should consult their calendars to determine if those proposed dates may be confirmed.

Public Comment: Mary Green – Records Custodian in the matters of (1) Randy George v. NJ Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skyland (2008-206) and (2) Randy George v. NJ Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skyland (2008-209).

Ms. Tabakin read the Resolution for Closed Session (Resolution Number 2009-09-30) to go into closed session pursuant to N.J.S.A. 10:4-12.b(7) to receive legal advice and discuss anticipated litigation in which the public body may become a party in the following matters:

1. New Jersey Foundation for Open Government v. New Jersey Government Records Council (in Superior Court)

²¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

A motion was made to go into closed session by Ms. Kovach and seconded by Ms. Forsyth to go into closed session. The motion was adopted by a unanimous vote. A motion was made by Ms. Kovach and seconded by Ms. Forsyth to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 11:07 a.m. until 11:12 a.m.

Open Session reconvened at 11:14 a.m. and Ms. Hairston called roll.

Present: Ms. Tabakin, Ms. Kovach, and Ms. Forsyth.

A motion to end the Council's meeting was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Meeting adjourned at 11:15 a.m.

Respectfully submitted,

Robin Berg Tabakin, Chairwoman

Date Approved: